APPENDIX

The relevant part of such statutes, as are deemed to have an important bearing upon the issues raised by this petition are as follows:

Railroad Retirement Act:

45 U.S.C. Sec. 228a:

> "(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), * * * and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer * * *"
>
> "(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative. The term 'employee' shall include an employee of a local lodge or division defined as an employer in subsection (a) only if he was in the service of or in the employment relation to a carrier on or after the enactment date."
>
> "(c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: * * *"
>
> * * *
>
> "(h) The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more

employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost."

* * *

"(l) The term 'employee' includes an officer of an employer.

"(m) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to Chapter 1 of Title 49."

Railway Labor Act:

45 U.S.C. §151, First and Fifth:

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to chapter 1 of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, * * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: * * *

Joint Hearing with Railroad Retirement Board
INTERSTATE COMMERCE COMMISSION

Ex Parte No. 72 (Sub-No. 1)
IN THE MATTER OF REGULATIONS CONCERNING CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

Submitted..... Decided.....

Enginemen and trainmen paid by a copper company, and engaged in operating trains of empty and loaded freight cars, owned by that company, over tracks owned by the Nevada Northern Railway Company and used by the copper company under trackage rights, not shown to be railway employees within the meaning of the Railway Labor Act.

Frank L. Mulholland, Clarence M. Mulholland, Willard M. McEwen, E. H. Kruse, and *Eugene Morton* for petitioners and intervener.

C. C. Parsons and *W. Howard Gray* for railroad and copper companies.

PROPOSED REPORT BY EXAMINER CLAUDE A. RICE

In response to a joint petition filed on March 14, 1939, in behalf of the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen, this proceeding was instituted for purpose of determining whether certain workers who are in service on the so-called ore line of the Nevada

Consolidated Copper Corporation and/or the Nevada Northern Railway Company, are railway employees within the meaning of the fifth paragraph of section 1 of the Railway Labor Act, which paragraph is reproduced in the margin.[1] A joint hearing was held by an examiner of this Commission and an examiner for the Railroad Retirement Board. The Switchmen's Union of North America intervened. Neither the brotherhoods nor the intervener introduced any evidence.

The ore-line workers here involved are enginemen and trainmen who operate trains of freight cars, containing copper ore, from assembly yards at Ruth and Copper Flat, Nevada, near copper mines, to an interchange yard at McGill, Nevada, about 22 miles, where an ore-crushing mill and smelter are located.[2] They also move trains of empty cars in the opposite direction. The locomotives, the freight cars, the mines, the ore, the crushing plant, and the smelter are owned by the Kennecott Copper Corporation, and are operated by the Nevada Consolidated Copper Corporation as managerial agent. The latter has no assets. Herein, the two concerns are regarded as one organization and, unless otherwise noted, are

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[1]Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such orders. . . .

[2]The evidence of record indicates that assembly yards are available at both Ruth and Copper Flat, but that cars of ore tonnage are generally assembled into trains at the Copper Flat yard.

referred to singly and collectively as the copper company. The hauls from Ruth and Copper Flat to McGill are over tracks owned by the Nevada Northern, and used by the copper company under a trackage agreement which has been in force for 19 years. All train movements over the jointly used tracks are governed by orders issued by train dispatchers of the Nevada Northern, and by operating rules and regulations formulated by that carrier. The dispatching expense is apportioned monthly between the railroad and the copper company. The ore-line workers are paid semi-monthly by copper company checks. Individuals seeking employment on the ore line are examined as to physical fitness by the medical department of the copper company. If approved, they are then examined respecting their knowledge of train rules by Nevada Northern officials, and are hired by those officials. In addition, the ore-line workers are summoned for duty, when work is available, by Nevada Northern officials. The expense of examining, hiring, and supervising such workers is billed monthly and is borne by the copper company. Ore-line workers who disobey railroad operating regulations may be suspended by railroad officials from service on the ore line, and after conference with copper company officers, may be discharged unless transferred by the copper company to other duties. The brotherhoods and the intervener contend that the ore-line workers are in the service of the Nevada Northern, and are railway employees. The copper company and the Nevada Northern claim that those workers are engaged in interplant service of the copper company; that they are not in the service of the Nevada Northern, and are not railway employees.

The Nevada Northern is a class I common carrier and its

line was constructed, about 1907, primarily to provide an outlet for products of the copper mines. All outstanding railroad capital stock except directors' qualifying shares is owned by the copper company. That company and the railroad are separate corporate entities. Each has its own operating officials, and the operating officers of the one do not exercise any jurisdiction or control over the operating officers of the other.

The northern terminus of the Nevada Northern connects with a line of the Southern Pacific Company in northeastern Nevada at Cobre, and from that point the Nevada Northern main line extends southward in Nevada to Shafter, 18.5 miles, where it intersects a line of the Western Pacific Railroad Company; thence southward to East Ely, 120.6 miles; thence westward to Copper Flat, about 9 miles; thence westward to the terminus at Kimberly about 2 miles. Ruth is southward from Copper Flat 1.1 miles, and those points are connected by two rail tracks. One track is owned by the Nevada Northern, and the other by the copper company. Near Ruth the copper company owns and operates both surface and underground mines, also a series of plant tracks over which its switching locomotives, freight cars, and dump cars are moved. At McGill, plant tracks extend from the railway interchange yard to the ore-crushing mill and the smelter. Copper company employees aggregate about 1,950 of which 27 to 30 are ore-line workers; 115 serve as switching crews in the vicinity of the Ruth mines; 35 switch cars to and from the McGill crushing plant and smelter; while the remainder work in or about the mines, the mill, the smelter, or the repair shops.

Standard steel gondola-type freight cars owned by the copper company are loaded with ore while such cars are standing on plant tracks at the Ruth mines, and are then moved by

mine switching crews to assembly yards, owned by the Nevada Northern but used by the copper company under trackage rights, and are assembled by mine switching crews into trains averaging about 30 cars. The ore-line workers here involved move the trainloads of copper ore in an easterly direction over the main line of the Nevada Northern through East Ely to Hiline, 12.6 miles, thence northeastward over a branch line of the Nevada Northern to McGill, 8.7 miles. In May 1939 a total of 5,412 carloads of ore weighing about 400,000 tons was thus transported, and in the year 1938 the aggregate was 4,200,746 tons. The loads average about 70 tons per car. From the McGill yard the cars of ore are moved by copper company switching crews to the crushing plant. The branch line track between Hiline and McGill is used exclusively by locomotives and trains operated by the copper company. Shipments moved to and from McGill by the Nevada Northern are transported over another branch line which diverges from the main line at McGill Junction, 2.6 miles westward from McGill. Measured by total car miles, the copper company handles more than 98 percent of the aggregate freight traffic moved over the line which that company uses pursuant to trackage privileges. The remainder, or less than 2 percent, consists of freight which the Nevada Northern transports on tariff rates.

The Nevada Northern is largely dependent upon the copper company for freight traffic. Tons of freight transported by that railroad company on tariff rates in the calendar years 1935, 1936, 1937, and 1938 amounted to 190,704; 284,999; 345,172, and 320,552, respectively, and for that 4-year period the shipments consigned by and to the copper company accounted for 85.6 percent of the total tonnage. The other

14.4 percent consisted of mine products, shipped by several relatively small producers, and miscellaneous freight.

For several years prior to September 1, 1920, the ore produced at the Ruth mines was transported by the Nevada Northern to the McGill crushing plant on tariff rates, detailed in *Guaranty Settlement with Nevada N. Ry. Co.,* 138 I. C. C. 40, wherein it was found that this carrier's net railway operating income, for the 6-year period ended December 31, 1920, averaged about 20 percent annually on its property investment. The transportation act of 1920 authorized the Federal government to recapture from a rail carrier in any calendar year a portion of earnings in excess of 6 percent on its property valuation. To enable the Nevada Northern to avoid remitting part of its earnings to the Federal government, pursuant to the recapture provision, that carrier and the copper company entered into a contractual agreement under which the latter, effective September 1, 1920, was granted the right to operate its locomotives and cars, and to transport its ores, from certain mining areas, over Nevada Northern tracks hereinbefore described to and from the McGill yard. The copper company is specifically prohibited from transporting property owned by others. As compensation for the trackage privileges, the copper company agreed to pay to the Nevada Northern a portion of the taxes assessed upon the railroad trackage used, a portion of the expense of roadway operation and maintenance, and a prorata sum, based on the percentage which the copper car miles bears to total car miles, with the object of enabling the Nevada Northern to earn each year an amount equal to 6 percent on the value of the railroad property jointly used by the railroad and the copper company. The trackage contract may be

cancelled by either of the signatory parties upon 60 days' notice in writing.

The copper company acquired from the Nevada Northern a number of locomotives and freight cars which had been utilized, prior to September 1920, in the transportation of ore between Ruth and McGill. All repairs, other than minor and emergency repairs, to the copper company's locomotives and cars which are operated over the line of the Nevada Northern are made at the shop maintained by that railroad at East Ely, but such repairs are not covered by the trackage agreement. The expense of this repair service is borne by the copper company, which keeps on hand a portion of the materials used in repair work. Locomotives and dump cars operated by the copper company at its mines, crushing plant, and smelter, together with mining machinery, are repaired in its own shops at Ruth and McGill.

Some of the workers who had been engaged prior to September 1920 in the transportation of ore from Ruth to McGill were taken over at that time by the copper company, and transferred to its payroll. But to protect the seniority rights of these workers, and to enable them to return to the service of the Nevada Northern, in the event they should desire to return if opportunities were afforded, the railroad granted them leaves of absence, and for approximately 14 years the transferred workers who remained in the ore-line service were carried on two seniority rosters, viz., the seniority record maintained by the railroad, and the similar record established by the copper company. In April 1934 when N. R. A. code and working regulations for employees of industrial organizations were adopted, the transferred workers

who were still in the ore-line service of the copper company were notified that their leaves of absence would be cancelled, and as a consequence the railroad seniority rights and railroad connections of those who elected to remain with the copper company were terminated.

It was understood in 1920, when the ore-line workers were transferred from the Nevada Northern to the copper company, that their basic wage scales would be the same as the scales then applying, or which might thereafter apply, to workers performing similar service for the Nevada Northern, and each transferred worker signed a form of statement providing that ". . . in all matters pertaining to pay, working conditions, and adjustment of questions or disputes, I will be governed strictly by the agreement now in force, or such agreement as may be entered into between the Nevada Northern Railway Company and its employee representative of service to which I may be assigned." Accordingly, whenever deductions or increases have since been made in the basic wage scales of enginemen and trainmen employed by the Nevada Northern, similar deductions and increases have been made in the compensation of the ore-line workers. New employees entering the ore-line service are required to sign a form which states that "in entering the service of the Nevada Consolidated Copper Corporation in their ore transportation service, it is understood that by reason of said service being operated over tracks of the Nevada Northern Railway, I am subject as an employee in such service to the rules and regulations of the Nevada Northern Railway Company. I have been fully advised as to the wage rates in effect by the Nevada Consolidated Copper Corporation as governing said ore service, and conditions pertaining thereto; and in making

application for position of . . . . it is understood that such wage rates and service conditions are satisfactory to me."

After establishment in 1934 of the N. R. A. code, a grievance committee representing the ore-line workers presented to copper company officials a comprehensive document in which they claimed to be engaged in interplant service of the copper company, and in which they manifested a desire that their wages be fixed and dealt with independently and without regard to the wage scales in effect on the Nevada Northern. It appears that this grievance was submitted primarily with the object of securing cancellation of a deduction, made in their wages about April 1932, following a wage deduction made by the Nevada Northern and many other rail carriers. The workers also sought to recover the amounts which had been deducted. At the conference held to discuss the grievance, it developed that each ore-line worker had agreed in writing, as hereinbefore shown, that his wages should be predicated on the basic wage levels in effect on the Nevada Northern, and the grievance was therefore dropped.

The copper company submits reports and makes payments, for account of the ore-line workers, to the Federal Social Security Board, and to the Nevada State Industrial Commission. It also complies with the Federal Fair Labor Standards Act of 1938, which among other things fixes the working periods of certain industrial employees as 8 hours per day and 42 hours per week (40 hours beginning October 1, 1940), and, for additional service, provides for payment of wages at 1½ times the regular rate.[3]

[3]Under the 1938 Fair Labor Standards Act (passed more recently than the Railway Labor Act), the ore-line workers cannot be said to be railway employees unless their employer is a carrier subject to Part I of the Interstate Commerce Act.

Pursuant to an employee operating arrangement, copper company officials notify the railroad dispatcher or trainmaster from time to time respecting the number of carloads of ore wanted at the McGill crushing plant, and, in turn, a railroad official summons a sufficient number of ore-line enginemen and trainmen to transport the tonnage. A railroad officer summons the workers for duty because their home terminal and the principal offices of the railroad are at East Ely, whereas the copper company has no supervisory officials at that point. Ore-line workers report on duty and off duty at East Ely. Written records of working time claimed by each man are transmitted to the Nevada Northern timekeeper, who checks the time against the train sheets maintained by the train dispatcher, and when certified as correct the time records are forwarded to and used by the copper company as bases for semi-monthly checks issued to each worker in payment of wages. A record, showing hours worked daily by each man, is placed in the railroad files to demonstrate to inspectors for the Interstate Commerce Commission that the railroad and the ore-line workers have complied with the Federal Hours of Service Act. Under that statute, any person who operates a train over the line of a common carrier is prohibited from being on duty more than 16 continuous hours, and after being on duty for that period the individual must be relieved and not be permitted to again go on duty until 10 hours have expired.

The expense of services performed by the railroad for the copper company in connection with the trackage agreement and operating arrangement is embodied in bills rendered monthly. As illustrative, bills for February 1939 contained the following items: Copper company proportion of taxes

$2,035.47; rental of ore-line tracks, $3,346.56; material for repairs to ore-line engines $975.33; fuel oil for starting fires, road-locomotive oil and water, $123.86; train, enginehouse, and other supplies $231.50; expense for labor in repairing locomotives, in repairing and inspecting ore cars, and for enginehouse work $4,187.66; coal for locomotives $6,208.51; proportion of store, shop, and enginehouse expense $1,406.54; power consumed in repairing ore-line cars $48.07; proportion of expense directly allocated to joint tracks for maintenance of way, structures, and equipment, for superintendence, train dispatching, station employees, stations, crossing protection, telegraph and telephone operations, $7,782.81; proportion of expense, not directly allocated to joint tracks, for maintenance of way, structures, and equipment, for traffic and transportation superintendence, stationery, salaries of general officers, clerks, etc., $2,552.15. A carrier official testified that its accounts have been checked by representatives of this Commission. The copper company paid 98.8 percent of the maintenance and other expense for February 1939 which was allocated to the ore-line roadway.

Ore-line workers are not granted free or reduced railroad transportation. When ill or injured they are cared for at the expense of the copper company at its Steptoe Valley Hospital, or at one of the emergency hospitals which the copper company maintains at Ruth and McGill. The Steptoe hospital also accepts railway employees, who are ill or injured, upon payment by the railroad of $12 per person per day.

The primary purpose of the Railway Labor Act, as stated therein, is to preclude interruptions to the flow of commerce. With this object in view, rail carriers and their employees subject to the Act are directed to exert every reasonable effort

to make agreements and to settle disputes, concerning rates of pay, rules, and working conditions, by conferences or by other methods detailed in the statute. The Act does not apply to all rail carriers, and whenever there is doubt as to whether a particular carrier is subject to its provisions, this Commission has authority upon receipt of an appropriate petition to hold a hearing, issue a report, and render a decision. A substantial number of such decisions have been entered in proceedings wherein the Commission was asked to determine whether certain electric railroads are carriers, subject to the Railway Labor Act, or whether they are street, suburban or interurban lines and not within the purview of that statute.[4] Also, if there is doubt as to whether or not certain workers are railway employees within the import of the Railway Labor Act, this Commission may upon request conduct a hearing, issue a report, and decide the question. Several such decisions, hereinafter briefly reviewed, have been rendered by divisions of this Commission. These cases are of two classes: First, those in which the Commission was asked to determine whether certain workers are railway employees or railway subordinate officials, as distinguished from higher officials who are not subject to the Railway Labor Act. Second, proceedings relating to workers whose names are not carried on railroad payrolls as employees of individual carriers, but who are hired by employers other than railroads to perform a service said to be connected in one way or another with the transportation of passengers or freight.

Both official and non-official workers who are individually listed on the payrolls of railroad common carriers were

[4]208 I.C.C. 193, 203, 211; 211 I.C.C. 4, 9; 214 I.C.C. 81, 167, 353, 707, 717; 215 I. C. C. 414; 216 I. C. C. 745; 218 I. C. C. 123, 253; 219 I. C. C. 135; and 229 I. C. C. 48.

long ago grouped into designated classes pursuant to orders issued by this Commission, and the number of workers in each class is reported to this Commission regularly in monthly and annual reports.

The first Commission decision pertaining to the Railway Labor Act was entered more than 10 years ago. Thus, in "*Employee Under Railway Labor Act,* 136 I. C. C. 321, decided January 24, 1928, Division 1 found the workers in service of the Trunk Line Association, a carrier agency, to be railway employees. The association is a voluntary organization created and supported by 16 of the larger railroads operating lines in eastern trunk-line territory. All of its expenses, including salaries of personnel, are paid by the member railroads. The association work includes the selling of railroad tickets, consideration of rate matters, issuance of tariffs, supervision of stoppage of freight in transit, supervision of weighing and inspection of shipments, and collection of moneys due carriers. The Commission had previously ruled that workers of some of the classes involved might lawfully be granted free railroad transportation. In *Regulations Concerning Employees Under Ry. Labor Act,* 218 I. C. C. 141, decided August 4, 1936, Division 3 found that signal foremen in service of the Union Pacific Railroad Company northwestern district, and in charge of construction or repair gangs or in charge of a signal repair shop, at salaries of $210 to $215 per month, are no more than subordinate officials, and are railway employees subject to the Railway Labor Act. In *Regulations Concerning Employes Under Ry. Labor Act,* 222 I. C. C. 687, decided June 23, 1937, Division 3 found that the district and division storekeepers of the Chicago & North Western Railway Company are subordinate officials,

and therefore employees subject to the Railway Labor Act. In *Regulations Concerning Employees Under Ry. Labor Act,* 229 I. C. C. 410, 232 I. C. C. 49, Division 3 found that Red-Cap workers who, among other things, carry to or from railway trains the hand baggage of passengers are railway employees. Therein it is said that Red Caps at many railroad stations are paid salaries or wages by railroad companies for the services they perform, although this compensation may be augmented by tips; that their uniforms may be provided in whole or in part by railroads; and that some rail carriers regard them as eligible to lawfully receive free transportation. In *Regulations Concerning Employees Under Ry. Labor Act,* 231 I. C. C. 91, decided December 7, 1938, and not reviewed by the Commission, Division 3 found that several hundred workers employed by Fred Harvey are railway employees within the meaning of the Railway Labor Act. Fred Harvey is a contractor who for many years has served meals in dining cars operated in trains of the Atchison, Topeka & Santa Fe Railway System. In *Regulations Concerning Employees Under Ry. Labor Act,* 232 I. C. C. 44, decided March 29, 1939, Division 3 found that the general yardmasters, terminal trainmasters, trainmasters, and their respective assistants, in service of the Denver & Rio Grande Western Railway at Denver, Pueblo, Grand Junction, and Salida, Colo., and at Salt Lake City and Helper, Utah, are not vested with sufficient authority to stamp them as officials, and are therefore railway employees within the import of the Railway Labor Act, but said that if a general yardmaster at Denver and one at Salt Lake City should be delegated authority to employ, dismiss, or discipline employees, such yardmasters might be

regarded as officials not subject to the Railway Labor Act. In *Regulations Concerning Employees Under Ry. Labor Act,* decided May 9, 1940 (mimeographed), Division 3 found that workers employed by an independent contractor at Superior Wis., and engaged in transferring iron ore from railway cars to a lake dock, and from the dock to steamships operated on the Great Lakes, are not railway employees within the meaning of the Railway Labor Act. None of the decisions, discussed above, deal with conditions which are comparable with those involved in the instant proceeding.

The brotherhoods declare that "the Railway Labor Act is a piece of social legislation designed to accomplish beneficial public ends," and they say that "where a liberal interpretation will result in making the application of the statute co-extensive with the social purpose sought to be achieved, such a liberal interpretation should surely be adopted." Their conception of a liberal interpretation, in the instant proceeding, is a finding that the ore-line workers are Nevada Northern employees. They cite a decision by Division 3, relating to employees of the Fred Harvey dining-car service on the Atchison, Topeka & Santa Fe Railway System, *Regulations Concerning Employees Under Ry. Labor Act,* 231 I. C. C. 91, wherein it is said, at page 98, that the Railway Labor Act "has been recognized as in the highest sense remedial and should be interpreted so as to effectuate its purpose." The brotherhoods declare that the instant case falls squarely within the principle stated in that opinion. The general purposes of the Railway Labor Act are outlined in section 2

thereof and are detailed in the margin.[5] With those purposes and other provisions of the Act to serve as a guide, it seems obvious that each case should be decided on its merits and on the evidence therein. If, as contended, the finding sought by the brotherhoods would be of remedial and beneficial character, it should be possible to point out, or at least to indicate, what particular condition or conditions would be remedied or improved by such finding, and what person or group of persons would be benefited. But neither the evidence nor the briefs herein definitely point to any undesirable working condition on the ore line, nor to any person or group of persons who would be benefited, either socially or otherwise, by the finding sought. On the other hand, there is ground for the belief that such a finding might be very injurious to some or all of the ore-line workers. They apparently have much to lose and nothing to gain. They now receive the same basic wage scales as employees performing similar service for the Nevada Northern. Their hours of labor, as hereinbefore noted, before overtime begins at a higher rate, are 8 hours daily and 42 hours weekly (40 hours after October 1, 1940), pursuant to Federal statute, namely, the Fair Labor Standards Act of

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[5]Sec. 2. The purposes of the Act are (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, and working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

1938, and there is no showing herein that Nevada Northern employees receive overtime wages for all service in excess of 42 hours weekly. As employees of the copper company, the ore-line workers enjoy seniority rights, according to length of service, and this feature seems to be of considerable importance. If it were found that henceforth they will be treated as employees of the Nevada Northern, these seniority rights would at least be partially lost. The workers who head the seniority list on the copper company roster could not hope to be placed at the head of the Nevada Northern roster. As a consequence, those copper company employees who now receive first call when ore-line work is available could not expect to receive first call if they were found to be railroad employees and this ore-line service were transferred to the railroad. The production of copper, and the freight traffic of the Nevada Northern, are subject to wide fluctuations, and in a period when railroad traffic is relatively light this impairment of seniority positions might be a very serious detriment. It might mean the difference between having work to do or being idle. It is to be noted that the ore-line workers are not complaining. The hearing herein was held at Ely, Nevada, near their homes, but none of them offered any testimony.

The brotherhoods attach considerable importance to the fact that the movements of trains operated by the ore-line workers are governed by orders issued by Nevada Northern train dispatchers, and by rules and regulations formulated by officials of that railroad; the fact that persons seeking employment on the ore line are examined, in part, and hired by railroad officials; the fact that ore-line workers are summoned for duty by railroad officials; and the fact that railroad officials are empowered to suspend from work on the

ore line any copper company employee who fails to comply with the afore-mentioned orders, rules, and regulations. As a consequence of these operating practices, the brotherhoods maintain that the ore-line workers are under the supervision and direction of Nevada Northern officials, and are Nevada Northern employees. The copper company claims that the Nevada Northern acts as agent when its officials perform the supervisory and other services above detailed, and points out that those services, paid for each month by the copper company, are rendered by Nevada Northern officials as part of the operating arrangement entered into as a consequence of the trackage agreement which was executed. The statute here under consideration is the Railway Labor Act. In order to be a railway employee within the meaning of that Act, a worker must be in the service of a carrier.[6] The ore-line workers are not in the service of the Nevada Northern, because the work they do is the work of the copper company. The Nevada Northern does not transport the ore tonnage, and is without authority to do so. Hence, the ore-line service cannot accurately be termed the work of a railroad employee.

It is not unusual for a railroad company to operate its freight trains over the line of another rail carrier, either because of a trackage agreement, a detour made necessary by damage to its own line, or a service order issued by this Commission, and while operating over the line of such foreign railroad its train crews must for safety and other considerations be governed by orders, rules, and regulations issued by train dispatchers and other officials of the railroad whose line is being used.

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[6]The definitions of "employee" and "carrier" appearing in the Railway Labor Act are elsewhere reproduced herein.

After examining several court decisions, the brotherhoods declare that where certain individuals are definitely employees, and a question is raised as to which of two parties is their employer, it appears to them that the question must be answered by considering who hires the employees; who pays their wages; who has the power of discharge; and who has the right to control them in the performance of their duties. However, in most of the court cases cited by the brotherhoods, the determining factor seems to be "whose is the work being performed." The hiring, payment of wages, right to control and discharge, are matters which may aid in identifying the employer, but neither of these is conclusive in all instances. According to the weight of judicial authority, the employer is the individual or company whose work is being performed.

Three decisions by the United States Supreme Court are mentioned in the brotherhood brief, and are hereinafter reviewed. Each relates to liability for personal injuries, and neither is directly in point. Nevertheless, the brotherhoods have discussed them, have quoted from them, and apparently rely on them to some extent.

An important and leading case, cited by the brotherhoods, is *Standard Oil Company* v. *Anderson*, 212 U. S. 215, wherein it is explained that while a steamship was being loaded with case oil at Bayonne, N. J., by a gang of longshoremen hired by a contractor, with the aid of a winchman hired by the oil company to operate a hoisting apparatus, a longshoreman named Anderson was injured through negligence of the winchman. The contractor paid the oil company a specified amount to do the hoisting. Anderson sought damages, and the defendant oil company undertook to avoid liability, for negli-

gence of its employee, by contending that the winchman and longshoreman were working for the same employer (the contractor), and were fellow servants. This contention was supported by evidence that the winchman operated the hoist in response to signals given by a member of the contractor's crew, and to that extent his service was directed and controlled by the contractor. However, the court held that the winchman was an employee of the oil company, because operation of the hoist was work which the oil company had undertaken to do, for a price, and it was the oil company's work. The injured longshoreman was an employee of the contractor because he was performing work which the contractor had agreed to do, and in the doing thereof it was the contractor's work. In the instant proceeding, the haulage service performed by the ore-line enginemen and trainmen is the copper company's work, and is not transportation service by the Nevada Northern. Hence, the cited decision does not appear to support the brotherhood contention that the ore-line workers are Nevada Northern employees.

Another citation is *Linstead Co.* v. *Ches. & Ohio Ry.*, 276 U. S. 28, decided February 20, 1928. Therein it is said that a line of the Chesapeake & Ohio Railway Company comes from the east along the southern bank of the Ohio River to a terminal yard at Stevens, Ky., thence westward about 12 miles farther and across the river into Ohio to an interchange point near Cincinnati, where this carrier interchanges freight traffic with the Big Four railroad. Under a reciprocal arrangement between the two railroads, a Big Four train crew operated a Big Four locomotive and caboose from Cincinnati, over the line of the Chesapeake & Ohio, eastward to Stevens, and on the return trip the crew moved cars of freight from

Stevens, over the Chesapeake & Ohio rails, to the aforementioned interchange tracks. While on the Chesapeake & Ohio rails, the Big Four train crew was subject to Chesapeake & Ohio orders, rules, and regulations. The Big Four railroad received nothing for the service performed by its crews on the Chesapeake & Ohio line, except a reciprocal service rendered elsewhere by the latter railroad. The cars movd by the Big Four from Stevens to the interchange yard contained freight for which the Chesapeake & Ohio collected its tariff charges, and which was in the possession and custody of that railroad. While the Big Four crew was operating a train composed of a locomotive, 22 loads, 18 empties, and a caboose over the Chesapeake & Ohio rails, a Cehsapeake & Ohio locomotive crashed into the Big Four caboose and a member of the Big Four crew was killed. In a claim for damages, the court held that the Chesapeake & Ohio was liable. The decision was supported by a finding that the Big Four crew was doing Chesapeake & Ohio work, and that the crew members were at that particular time employees of the Chesapeake & Ohio within the meaning of the Employers' Liability Act. The rule of law enunciated does not appear to support the brotherhood view that the ore-line workers are not performing Nevada Northern work when they operate trains over the jointly used tracks, the Nevada Northern does not collect tariff charges for the movement of this tonnage, nor is that carrier in possession and custody of the tonnage.

Denton v. *Yazoo & M. V. R. Co.*, 284 U. S. 305, also cited by the brotherhoods, was decided January 4, 1932, and pertains in part to a station porter named Hunter who was hired and paid by the Illinois Central Railroad Company. This carrier transports United States mail, and was required by

a government regulation to furnish the men necessary to load the mails into and receive them from the doors of railway post office cars. While engaged at Jackson, Miss., in transferring United States mail bags from a platform truck to a mail car, under the direction of a United States postal transfer clerk, Hunter handled the mail bags in such manner that a postal employee working in the car was injured, and in a legal proceeding by the injured worker to recover damages, the Supreme Court held that the Illinois Central was not liable for the negligence of Hunter because he was doing government work when the postal employee was injured; that the statutory obligation imposed upon rail carriers is simply to transport mail offered for transportation by the United States; that they are not required to load or receive mail matter, but only to furnish the men necessary for those purposes. The court said it is elemental that when one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former; and that in determining whether a given case falls within one class or the other, inquiry should be made to ascertain whose work is being performed, and cited *Standard Oil Co.* v. *Anderson,* 212 U. S. 215; *Linstead* v. *Chesapeake & Ohio Ry. Co.,* 276 U. S. 28; *Harrell* v. *Atlas Portland Cement Co.,* 250 Fed. 83, 85; *Brady* v. *Chicago & G. W. Ry. Co.,* 114 Fed. 100, 107; *Wyllie* v. *Palmer,* 137 N. Y., 248, 257; 33 N. E. 381; *Higgins* v. *Western Union Telegraph Co.,* 156 N. Y. 75, 78; 50 N. E. 500; *Cotter* v. *Lindgren,* 106 Cal. 602, 607; 39 Pac. 950; *Rourke* v. *White Moss Colliery Co.,* L. R. 2 C. P. Div. (1876-1877) 205. The rule of law applied does not appear

to support the brotherhood view that the ore-line workers are Nevada Northern employees, because those individuals are not performing Nevada Northern work.

The copper company and the Nevada Northern contend that the Railway Labor Act does not apply to the ore-line workers, because the services in which they are engaged is not carriage for hire, and, according to their view, is not transportation in the sense in which this word is used in the Railway Labor Act, but is merely haulage by an industry of its own crude ore, in its own vehicles, from points near its own mines, to a yard near its own plant where the material is crushed and approximately one ton of copper concentrates extracted from each 25 tons of ore. Section 1, first paragraph, of the Railway Labor Act, defines the term "carrier" as any—

> . . . carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation . . . and handling of property transported by railroad . . .

The copper company maintains that it is not a carrier by railroad, subject to the Interstate Commerce Act; that it does not perform a service in connection with the handling of property transported by railroad; and therefore that it is not a carrier within the meaning of the Railway Labor Act.

Among the court decisions cited by the copper company, in support of its contention that the ore movement is not connected with railroad transportation, is *Penna. R. Co.* v. *Public Utility Comm'n.*, 298 U. S. 170, decided April 27, 1936, which pertains to the haulage of coal by a coal company from its

mines in the State of Pennsylvania in its own cars to a landing on the Monongahela River in that State; thence in its own barges down stream to an Ohio River landing in Pennsylvania; thence with its own motive power and cars over its own track a distance of about 11 miles to Negley, Ohio, where the coal was dumped, washed, broken up or assorted into sizes, and shipped intrastate over the lines of common carriers by railroad to destinations in Ohio. It was held that common-carrier transportation began when the coal was placed in possession of a railroad company at Negley, and that the private carriage from Pennsylvania to the Negley washing plant could not be tacked to the railroad transportation from that point, and the latter haul treated as part of an interstate movement from Pennsylvania to Ohio.

The provisions of the Railway Labor Act are of a positive and definite character. The line of demarcation between individuals who are railway employees, and those who are not railway employees, is quite sharp and clear.

To be a railway employee within the meaning of the Railway Labor Act, the worker must be in the service of a carrier. A rail carrier is defined by the Railway Labor Act as a railroad which is subject to the Interstate Commerce Act. The Nevada Northern Railway is a carrier of that type, but the copper company is not. The Railway Labor Act also applies to a company which is under the same control as a rail carrier, provided such company performs a service in connection with the handling of property which is transported by railroad. The Nevada Northern and the copper company are under common control, but the copper company does not haul property which is transported by the railroad. The ore

which is hauled by the copper company goes from the mines to the mill where it is crushed, and where about one ton of copper concentrates is extracted from each 25 tons of ore. The concentrates are then taken to a nearby smelter where they are melted, the impurities removed, and the metal converted into copper bars. It is these copper bars which are transported by the Nevada Northern on published tariff rates. Hence, it seems clear that the copper company is not a carrier, as that term is defined by the Railway Labor Act.

Inasmuch as the copper company is not a carrier, within the meaning of the Railway Labor Act, the only way the ore-line workers can legally be classified as railway employees is to find that they are in the service of the Nevada Northern. The work these men do is to move trainloads of crude ore in one direction, and trains of empty cars in the other. The ore is hauled by the use of locomotives and cars owned by the copper company, and by workers paid by that company. The ore trains pass over about 22 miles of Nevada Northern track which is used by the copper company under a trackage agreement that was executed about 19 years ago. Under this arrangement, the copper company pays a proportionate share of the taxes, roadway maintenance expense, and other operating expenses which are allocated to the 22 miles of track, and the accounting records pertaining thereto have been approved by this Commission. To hold that the ore-line workers are in the service of the Nevada Northern, it must be found that the movement of the ore trains is railroad transportation service which is performed by that carrier. And it cannot accurately be said as a matter of fact or as a matter of law, that the ore tonnage is moved by the Nevada Northern. At no time does this carrier have actual possession, or legal

possession, or custody of the ore tonnage. At no time does it transport, or have authority to transport that tonnage. It follows that the ore-line workers are not in the service of, and are not employees of, the Nevada Northern.

Several years ago the Nevada Northern and the copper company entered into a employee operating agreement, and some question has arisen as to what effect, if any, this arrangement has upon the legal status of the ore-line enginemen and trainmen. Under that agreement, certain Nevada Northern officials performs what might be termed a dual or joint service, since they act as operating officers in respect of traffic handled by the Nevada Northern under line-haul rates, and, in addition, they do certain supervisory work for the copper company, i.e., they issue train dispatching orders governing copper company ore trains which are moved over Nevada Northern rails under trackage rights; they have authority to select and hire new ore-line enginemen and trainmen, after the physical qualifications of the applicants have been approved by the copper company; they instruct ore-line workers with respect to rules and regulations which apply to persons who operate trains over Nevada Northern rails; and they have authority to suspend from work, on ore-line trains, enginemen and trainmen who fail to comply with those operating rules and regulations. These operating officials receive their entire salaries from the Nevada Northern, but the proportion of their time which is devoted to supervisory work for the copper company is recorded, and monthly bills for such service are rendered against and paid by the copper company. Hence, as a matter of form these operating officials are in the employ of the Nevada Northern. As a matter of substance, a portion of their time is devoted to copper com-

pany work and the copper company pays for that service. The ore-line enginemen and trainmen devote all their working time to ore haulage for the copper company, and, as a matter of both form and substance, they are in the service of that company. Their legal status, as copper company employees, is in no wise changed by the circumstance that certain Nevada Northern officials render supervisory services for both companies. From the standpoint of safety, it obviously is desirable that train dispatching orders and operating rules be issued by one group of officials.

Counsel for the participating parties entertain different views concerning the meaning of Section 1, Paragraph 5, of the Railway Labor Act. This paragraph, recited elsewhere herein and not yet construed by the courts, defines the term employee, and it appears from the definition that an individual may be in the service of a rail carrier and still not be an employee within the meaning of the Railway Labor Act. That statute provides three tests by which to identify the workers who are subject to its provisions. First, the individual must be in the service of a carrier. Second, the carrier must have continuing authority to supervise the service which the individual renders. Third, the work which the individual performs must be defined by this Commission as the work of a railroad employee or subordinate official. To be an employee within the meaning of the Railway Labor Act, an individual must pass all three tests. The ore-line workers involved in the instant proceeding are not even employees under the first test, because they are not in the service of a carrier as that term is defined by the Railway Labor Act. Nor are they railway employees within the meaning of the 1938 Fair Labor Standards Act.

On brief the brotherhoods assert that the question presented involves more than the application of abstract legal rules to a general legal problem, and they emphasize their contention that the Railway Labor Act is intended to accomplish beneficial results, but they make no attempt to show that the finding they seek would be beneficial to the ore-line enginemen and trainmen in respect of hours of service, wages, working conditions; sick benefits, old-age pensions, seniority rights, or otherwise. There is but little evidence of record concerning these matters. Such evidence as was introduced indicates that the finding sought by the brotherhoods would be injurious to the ore-line workers.

The Commission should find that the enginemen and trainmen here involved whose wages are paid by a copper company and who are engaged in operating trains of empty and loaded freight cars, owned by that company, over tracks owned by the Nevada Northern Railway Company and used by the copper company under trackage rights, have not been shown to be railway employees within the meaning of the Railway Labor Act.